BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

In the Matter of the Appeal of: S. KUMAR & CO., INC. 2320 So. Main Street Los Angeles, California 90007 Employer	Docket Nos. 93-R4D1-622 and 623 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having granted the petition for reconsideration filed in the above-entitled matter by S. Kumar & Co., Inc. (Employer), makes the following decision after reconsideration.

JURISDICTION

On February 26, 1993, the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment maintained by Employer at 2320 So. Main Street, Los Angeles, California. On March 4, 1993, the Division issued to Employer Citation No. 1, alleging a general violation of section 3203(a),[1] [failure to maintain a written safety program]; and Citation No. 2, alleging a serious violation of section 3235(e) [locked exit doors]. The Division proposed a total civil penalty of $1,500.

Employer filed a timely appeal, contesting the existence of the violations, the appropriateness of the penalties assessed, and asserting that the inspections and citations issued were a retaliation for Employer's dispute over garment plant registration renewal with the Department of Industrial Relations (DIR). After a hearing, an Administrative Law Judge (ALJ) of the Board issued a decision on February 15, 1994, finding violations as to both Citations Nos. 1 and 2, and reducing Citation No. 2 from a serious to a general violation, and the corresponding civil penalty from $1,250 to $250. The ALJ increased the civil penalty for Citation No. 1 from $250 to $300.

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[1] Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

Employer filed a timely petition for reconsideration on March 9, 1994. On March 31, 1994, the Board granted Employer's petition for reconsideration. On April 15, 1994, the Division filed its answer.

EVIDENCE

In making this decision the Board relies upon its independent review of the entire evidentiary record in this case, including the tape recordings of the hearing and each exhibit admitted into evidence. The Board adopts and incorporates by this reference the Summary of Evidence set forth on pages two through three and seven through eight of the decision of the ALJ.

Docket No. 93-R4D1-622
Citation No. 1
General
8 Cal. Code Regs. § 3203(a)

ISSUES

1. Did Employer comply with section 3203(a)?

2. Do the notice requirements of section 386(b) permit the increase in civil penalty assessed by the ALJ, and was the penalty assessed otherwise appropriate?

1. Employer Failed to Comply with Section 3203(a)

Section 3203(a) requires all employers to maintain an illness and injury prevention plan (IIPP). Employer's petition admits it was "missing" such a program. Nonetheless, it argues that documents that it posted, when viewed together, are the functional equivalent of an IIPP. The Board finds no merit in this argument.

At hearing, Kumar testified that he had posted Cal OSHA's standard notice, a workers' compensation medical panel, with instructions on how to handle claims in case of an accident, a doctor's telephone number, a document referred to as "Employees' Communication and Compliance and General Code of Safe Practices," and provided a first aid kit, as well as other matters less relevant to employee safety, such as Equal Employment Opportunity and Industrial Welfare Commission Order 89-1. None of these documents was introduced into evidence. Kumar also testified that Employer provided workers compensation insurance and another unspecified insurance policy.

Employer contends that taken together, these postings and other measures should be treated as the functional equivalent of an IIPP. Section 3203(a) is quite express, requiring that the IIPP include:

1. Identification of the person responsible for implementing the program;
2. A system for ensuring employee compliance;
3. A system for communicating with employees on safety;
4. Procedures for identifying work place hazards;
5. A procedure to investigate occupational illness and injury;
6. Methods and/or procedures for correcting unsafe or unhealthy work practices or procedures; and
7. Provision of training and instruction.

Employer's attempt to patch together the above documents into an IIPP fails to satisfy the requirements of section 3203(a). For instance, none identify the person responsible for implementing the program or set forth Employer's program system for identifying and evaluating workplace hazards or show Employer's methods for correcting unsafe working conditions.

Employer's contention that its patchwork of postings and provision of a first aid kit should be treated as functional compliance with the requirement to provide an IIPP must be rejected for another reason. Most of the postings relied on by Employer are required by this and other statutes. If Employer's argument were accepted, any employer who complied with statutory notice posting requirements would thereby be excused from maintaining an IIPP.

Employer further contends that it should be excused from maintaining an IIPP because of the burden it places upon small employers. Section 3203(b), incorporating the Legislature's amendments of Labor Code section 6401.7, addresses the needs of small employers by providing reduced record keeping and training documentation requirements for small employers. None of these exceptions excuse maintaining the seven elements of an IIPP.

Kumar also argues that he was excusably unaware that section 3203(a) requires a written plan, relying particularly on his testimony that prior safety inspections failed to find any violation and that the Division's representatives failed to bring the obligation to have a plan to his attention. Prior inspections finding no violations do not relieve Employer of its duty to have a plan nor does it excuse any other violation. (Advanced Components Technology, OSHAB 91-1045, Decision After Reconsideration (Nov. 13, 1992).) Ignorance of the requirements is not an excuse, since employers are under a duty to comply with the statute, which includes informing themselves of the regulations applicable to their operations and any changes in the requirements of the statutes and regulations relating to their work force.

(The Daily Californian/CalGraphics, OSHAB 90-929, Decision After Reconsideration (Aug. 28, 1991); McKee Electric Company, OSHAB 81-0001, Denial of Petition for Reconsideration (May 29, 1981).)[2]

The Board finds that Employer did not comply with the mandate of section 3203(a). Employer has therefore presented no basis for setting aside Citation No. 1.

2. The Increase in Civil Penalty May Not Be Enforced Because the Notice Requirement of Section 386(b) Was Not Complied with, but the Civil Penalty Is Otherwise Appropriate

The Division proposed a civil penalty of $250 for the IIPP violation. At hearing, Division safety engineer Cedro testified that in calculating that penalty, the Division afforded Employer a ten percent reduction based upon Employer's history of no violations. Neither the parties nor the ALJ raised any issue as to the ten percent reduction or questioned the applicability of the credit prior to the submission of the case to the ALJ for decision. In her decision, the ALJ held that the ten percent reduction was contrary to Labor Code section 6427, which, at the time of the inspection, prohibited any penalty reductions for prior history of citations or good faith, for employers who did not have an IIPP in place. The ALJ found that the Division inadvertently overlooked Labor Code section 6427, and therefore, by post-submission amendment, increased the civil penalty from $250 to $300. Employer contends that this $50 increase is unfair. The Board agrees.

Section 386, in pertinent part, provides:

"Post-Submission Amendments.

(a) The Appeals Board may amend . . . the Division action after a proceeding is submitted for decision in order to:

(4) Amend any part of the Division action to conform it to a statutory requirement.

(b) Each party shall be given notice of the intended amendment and the opportunity to show that the party will be prejudiced

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[2] Employer asks that Citation No. 1 be set aside because the ALJ found that the safety engineer's testimony on the issue consisted of hearsay statements by Layla Yafataly, whom Khanna Kumar identified as Employer's manager. In view of Employer's admissions at hearing and in its petition that it had no IIPP, and the ALJ's findings that the statements were admissible hearsay statements, the initial hearsay character of the safety engineer's testimony presents no basis for setting aside Citation No. 1.

thereby. If such prejudice is shown, the amendment shall not be made."

The ALJ sought to amend the civil penalty to conform it to a statutory requirement. Neither the record nor the ALJ's decision show that the parties were given notice of the amendment. Additionally, the Board notes that in 1993, the Legislature amended Labor Code section 6427 by deleting the language cited by the ALJ prohibiting credit for good faith or previous history of violations for employers not having an IIPP in place. It is reasonable to view the 1993 amendment as reflecting the Legislature's conclusion that denial of credit did not advance the policies of the Act and the safety regulations. Notice to the parties of the ALJ's intended amendment would have afforded the Division and Employer the opportunity to be heard on whether, given the legislative change, the credit for Employer's good history should apply. In the absence of compliance with the procedures of section 386(b), the Board finds the amendment inappropriate.

Employer further contends that the civil penalty for Citation No. 1 should be reduced or eliminated because it abated the violations, was unaware of the requirement to have an IIPP and because of its small size.

Abatement of violations alone is not a basis for reduction of penalties. (Pennville Corporation, OSHAB 76-004, Decision After Reconsideration (Feb. 24, 1977).) Employer has been accorded credits for abatement and its small size in the calculation of the civil penalties. Employer has shown no reason for further reducing the civil penalties, and the Board declines to do so. Employer's argument that it should not be held to the penalty for not having an IIPP unless Division representatives have personally brought the obligation to Employer's attention is without merit. The facts of this case show that Employer requires an incentive to make the effort to familiarize itself with employee safety standards imposed by the Labor Code and the applicable safety regulations. The civil penalty is intended to provide that incentive. The original civil penalty proposed by the Division shall be assessed.

Docket No. 93-R4D1-623
Citation No. 2
Serious
8 Cal. Code Regs. § 3235(e)

ISSUE

Should Citation No. 2 or the reduced civil penalty assessed by the ALJ be set aside entirely?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

The Violation Found and Civil Penalty Assessed by the ALJ Were Appropriate

Employer admits that, at the time of the inspection, its front door was locked and required operation of a remote access button to unlock in the direction of exit, in violation of section 3235(e). Citation No. 2 as issued alleged that all other exit doors from Employer's premises were also locked, an allegation the ALJ found the Division's evidence insufficient to sustain.

Employer raises equitable grounds for setting Citation No. 2 and any related civil penalty aside entirely. Those grounds are Employer's small size, its financial hardship, and the ALJ's finding that the violation was not serious. Section 3235(e) applies regardless of the employer's size. Employer, as discussed below, failed to provide evidence supporting its claim of financial hardship. That claim therefore provides no basis for setting aside the ALJ's order. The ALJ's finding a general rather than a serious violation is no ground for setting aside the violation, because a violation's existence presents an issue entirely separate from its classification. None of the arguments offered by Employer are grounds for setting aside a violation or further reducing the civil penalty. Additionally, as the Division argued in its Answer, Employer has failed to show any of the five grounds stated in Labor Code section 6617 required to support a petition for reconsideration. The Board affirms the ALJ's decision and the civil penalty it assessed.

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ISSUES

1. Did Employer prove the Division selected it for inspection based on a retaliatory motive?

2. Did Employer show it could not have produced financial documents at hearing?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

1. Employer Did Not Prove That the Division Selected It

for Inspection for Discriminatory Reasons

Employer asserts that the citations are the product of selective enforcement. This amounts to a claim of denial of equal protection, an affirmative defense. The burden of proving this affirmative defense falls on Employer and must be met by "showing by a preponderance of the evidence that the Employer has been singled out by the Division for inspection on the basis of some deliberate (i.e., purposeful or intentional) discriminatory enforcement based upon an unjustifiable . . . standard." (Sequoia Rock Company, OSHAB 76-1083, Decision After Reconsideration (Apr. 28, 1983).) In evaluating the defense, the Board has stated that "[t]he good faith of those enforcing the law and the validity of their action are presumed." (Bendix Forest Products Corp., OSHAB 79-1532, Decision After Reconsideration (Mar. 5, 1981).)

Employer alleges that the inspection and citations in this case were in retaliation for Employer's objections to the Department of Industrial Relations' (DIR) handling of Employer's application for a garment plant registration renewal. Employer characterizes the Division's workplace safety inspection as a conspiracy against it by the Division and the Labor Standards Enforcement Division, both agencies within DIR.

While Employer's petition alleges that the inspection occurred a few days after a telephone call by Employer's president, Khanna Kumar, to DIR, which concerned the renewal of a garment plant registration, no evidence was presented at the hearing sufficient to establish the date of the alleged telephone call, to whom it was made, or what was discussed. The Division's safety engineer testified that Employer was one of 11 companies randomly selected for inspection at the same time. The ALJ credited this testimony.

The Board will only disregard testimony credited by an ALJ where contrary evidence of considerable weight is offered. (Novo Rados Enterprises, OSHAB 76-305, Decision After Reconsideration at p. 18 (Feb. 23, 1983).) Here, Employer offers only the vague assertion of a telephone call to DIR a few days before the inspection.[3] This does not constitute evidence of considerable weight balanced against the credited testimony. The evidence fails to establish that Employer was selected for any unfair reason.

The Board therefore finds that the evidence is insufficient to establish that the inspection was in retaliation for Employer disputing the handling of its registration renewal. The Board finds no showing has been made that Employer was selected for inspection for any unjustifiable or unfair reasons.

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[3] The petition refers to letters written by Assembly members and senators to DIR on Employer's behalf. The only such letter in evidence, from an Assembly Member to DIR, was written more than eleven weeks after the inspection, and makes no reference to the Division's role in the inspection or to the citations it issued.

2. Employer Did Not Establish Financial Hardship Warranting a Reduction in Civil Penalties

In its petition, Employer renews its contention raised at hearing that financial hardship should excuse it from the civil penalties. The Board has recognized an employer's proven financial hardship as a basis for reducing or vacating proposed penalties. (Shiery Manufacturing, Inc., OSHAB 85-1739, Decision After Reconsideration (Jan. 5, 1987).) Employer at hearing offered only assertions that Employer's president was working extremely long hours and had not drawn a salary for two years, which did not address Employer's financial condition, but rather concerned Kumar's personal financial situation. The ALJ properly rejected Employer's contention, finding that Employer had not shown any specific evidence of financial hardship. (Tarrant Excavating & Paving, OSHAB 83-1160, Decision After Reconsideration (Jan. 30, 1985).)

Employer submitted no specific evidence of financial hardship at hearing, but transmitted its 1993 financial statement to the Board after it filed its petition. Labor Code section 6617 subsection (d) provides that a petition for reconsideration may be based on evidence not presented at hearing only if that evidence did not exist at the time of hearing or could not, with reasonable diligence, have been discovered and produced at the hearing. Employer's petition states that it could easily have provided the financial statement at hearing if the ALJ had directed it to do so. Based on this assertion, it is apparent that the financial statement was available to Employer at the time of the hearing, and could have been produced then. The Board therefore may not consider the financial statement.

The Board therefore declines to reduce the civil penalties on this ground.

DECISION AFTER RECONSIDERATION

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The decision of the ALJ dated February 15, 1994, is reinstated and affirmed in part and reversed in part. Employer's appeal from a general violation of section 3203(a) is denied. A civil penalty of $250 is assessed in lieu of the $300 civil penalty assessed by the ALJ.

Docket No. 93-R4D1-623

The decision of the ALJ dated February 15, 1994, is reinstated and affirmed. Employer's appeal from a general violation of section

3235(e) is denied. A civil penalty of $250 is assessed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD:
JAMES P. GAZDECKI, Chairman
BILL DUPLISSEA, Member
BRYAN E. CARVER, Member

SIGNED AND DATED ON DECEMBER 12, 1997 AT SACRAMENTO, CALIFORNIA